Office-Supreme Court, U.S.
FILED
MAY 4 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM 1961

No. 683

GEORGE HOOPER,

Petitioner,

against

TERMINAL STEAMSHIP COMPANY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

JACOB RASSNER,
Attorney for Petitioner,
Office & P. O. Address,
15 Park Row,
New York 38, N. Y.

INDEX

	PAGE
Opinion Below	1
Question Presented	1
Reasons for Granting Rehearing and Issuing the Writ	2
Argument	3
Certificate of Counsel	4
Appendix	5

Table of Cases Cited

DeLima v. Trinidad Corporation, C. C. A. =290, decided April 30, 1962, unreported as yet	3
Halecki v. United N. Y. & N. J. Sandy Hook Pilots, C. C. A. 2d =277, decided May 1, 1962, unreported as yet	2, 3

Supreme Court of the United States

October Term, 1961

No. 683

GEORGE HOOPER,

Petitioner,

against

TERMINAL STEAMSHIP COMPANY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of April 9, 1962, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed January 25, 1962 herein.

Opinion Below

The opinion of the Court of Appeals in the instant case had not been reported at the time of the filing of the original petition. It is now printed in full at 296 F. 2d 281.

Question Presented

1. Whether "inherent danger" which renders a ship unsafe to work on is an exception to warranty of seaworthiness.

Reasons for Granting Rehearing and Issuing the Writ

1. Petitioner combined his petition with three other petitioners. This fact may have had some bearing on the denial of petitioner's writ. Therefore, petitioner prays that his petition be considered on its own merits, free from any consideration of the other petitions.

2. The Court of Appeals for the Second Circuit on May 1, 1962, rendered a decision which is diametrically contrary to the decision by the Court below in petitioner's case. (*Halecki* v. *United N. Y. & N. J. Sandy Hook Pilots*, 4 CA 2d, =277, decided May 1, 1962, unreported as yet).

The Court below, in petitioner's case, held that "inherent danger" is an exception to the rule which imposes the absolute duty of fulfilling the warranty of seaworthiness on a shipowner towards maritime workers aboard such ship.

The case decided May 1, 1962 (*Halecki, supra*), holds this is not so.

This intervening conflict of decision (arising since denial of the petition herein) creates confusion as to whether or not "inherent danger" constitutes an exception to a shipowner's nondelegable duty to provide a seaworthy vessel to maritime workers thereon.

It is obvious that this question affects practically every maritime claim predicated on unseaworthiness, as many dangerous conditions may be factually classified as "inherently dangerous", and merely by such classification destroy a basic and substantial right of maritime workers, employed in a hazardous calling, to the right of protection by the imposition of an obligation on the shipowner to provide a safe place to work without any insulation against liability by reason of any real or theoretical excuse of due care.

Argument

Mindful of the fact that matter heretofore submitted is ordinarily not a proper matter for reprint in an application for a rehearing, but in order to obviate the need of the Court to dig from the original petition those parts which pertain to petitioner, we are reprinting, as an Appendix, that part of the original petition pertinent to petitioner's prayer for rehearing, solely for the convenience of the Court.

The decision in the *Halecki* case, *supra*, was written by Circuit Judge Medina, who is one of the Judges who concurred in the decision in the case at bar.

The following statement from *Halecki, supra*, seems to be a change of view of Judge Medina himself.

> "Finally, the shipowners contend that there is no obligation on their part to provide a reasonably safe place to work 'where the work itself creates a danger.' It is, we think a sufficient answer to say that the rule is to the contrary in that class of cases, such as the one now before us, where the shipowner requires work to be done in a manner inherently dangerous to human safety. In such cases the shipowner is required by law to take reasonable precaution to prevent injury to the employees of subcontractors engaged to do the work."

Circuit Judge Waterman, who concurred in the opinion of Chief Judge Lumbard in the decision below, seems likewise to have changed his views as recently as April 30, 1962, in the case of *DeLima v. Trinidad Corporation*, (C. C. A. 2d, #290, decided April 30, 1962 (unreported as yet), wherein the Court, in reversing the Trial Court below, held, in substance, that there is no exception to the absolute duty of furnishing a seaworthy vessel, and that reasonable care and caution is no exception to the rule.

Should the labelling of a dangerous condition as "inherent danger" be permitted to insulate shipowners from liability for breach of warranty of seaworthiness, there is nothing to prevent shipowners from escaping from the proximate consequences of breach of duty by the mere expediency of labelling each and every dangerous condition as an "inherent danger."

Petitioner submits that it is in the interest of the entire industry, employers and employees, to know whether or not exceptions to the absolute and nondelegable duty of providing a seaworthy vessel may be invented or declared as a bar to recovery, meeting each new set of facts with a novel exception to the rule.

Respectfully submitted.

JACOB RASSNER,
Attorney for Petitioner.

Certificate of Counsel

I, JACOB RASSNER, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 33 of the Rules of this Court.

JACOB RASSNER,
Attorney for Petitioner.

APPENDIX

This was a civil action tried by United States District Judge David N. Edelstein without a jury. On March 22, 1961, judgment was entered dismissing the complaint.

Petitioner's case is set forth by Judge Edelstein in his findings of fact as follows:

"17. On June 27, 1954, George Hooper and a fellow longshoreman known as Eugene Gatto were engaged in stacking, packing and compiling drafts of lumber in such a manner as to enable the ship's gear to lower them over the side.

"18. Between 2:30 and 3:30 p.m. on June 27, 1954, Hooper and Gatto were working in the vicinity of the No. 4 and No. 5 hatches preparatory to discharging a draft of lumber some 5' high, and 12' to 14' in length. The draft was loaded loose and all over the top layer of the after end turned out, requiring straightening.

"19. In the process of preparing the load for discharging, Hooper turned the draft of cargo with his back toward the rail near the off-shore side of the vessel, sank a cargo hook into the board furthest away from him and started to pull a plank into position. While in the act of so doing, the tottering, consisting of further lumber cargo, shifted so as to cause Hooper to be thrown off balance to his side. As Hooper lost his balance, he tried to steady himself by holding on to the hook, but the hook pulled out of the plank and Hooper, with the hook in his hand, fell over the side of the ship into the water, some 35' below."

On November 24, 1961, the Circuit Court of Appeals—Chief Judge Lumbard, Circuit Judge Medina and Circuit Judge Waterman—affirmed the decision of the Trial Court (original petition, pp. 4 and 5).

The only case cited by the Trial Court as authority in the Hooper case, supra, for the decision, is misinterpreted.[4]

The case of *Carabellese* v. *Naviera Azuer, S.A.*, 285 F. 2d 355 (2nd Cir. 1960), dealt with a stevedore negligently causing a piece of cargo to fall.

It is incomprehensible that the decision in the *Carabellese* case, *supra*, was so incorrectly interpreted in the face of the following language by Circuit Judge Friendly at page 359:

> "Since there was no evidence that the owner had known or could have known of the latent defect, this

---

[4] The *Dixon* case, *supra*, has been cited, with approval, innumerable times, and as recently as May 16, 1960 by the United States Supreme Court, in the case of *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 926.

None of the Circuit Court opinions citing *Mitchell* and discussing the issue here involved adopt the position that considerations of "how long" are admissible in an action on unseaworthiness. *Arena* v. *Luckenbach Steamship Co.*, 279 F. 2d 180, 180 (1st Cir. 1960); *Calderola* v. *Cunard Steamship Co.*, 279 F. 2d 475, 477 (2nd Cir. 1960); *Puerto Segura Cia. Naviera, S. A.* v. *Petros Patsilleas*, 279 F. 2d 599, 600 (4th Cir. 1960); *Grzybowski* v. *Arrow Barge Co.*, 283 F. 2d 481, 485 (4th Cir. 1960); *Carabellese* v. *Naviera Azuer, S. A.*, 285 F. 2d 355, 359 (2nd Cir. 1960); *Morales* v. *City of Galveston*, 291 F. 2d 97 (5th Cir. 1961); *Knox* v. *United States Lines Co.*, 294 F. 2d 354, 1961 A. M. C. 1708, 1715 (3rd Cir. 1961).

In *Carabellese*, this Court stated: "*Mitchell* * * * settles that a vessel cannot avoid liability for unseaworthiness merely because the owners have had no opportunity to remedy the unsafe conditions" (285 F. 2d at 359).

In the Circuit Court's opinion on remand in *Morales*, the majority opinion did not discuss the time element, essentially taking a position on the facts similar to that expressed by this Court in *Blier*. The vigorous dissent of Judge Rives asserted that time could not be a factor in determining unseaworthiness (291 F. 2d at 98-99).

For a persuasive District Court review of the issue, concluding that duration of condition cannot be a factor in an action on unseaworthiness, see Judge Hoffman's opinion in *Holley* v. *The Manfred Stansfield*, 180 F. Supp. 212, 215-216 (E. D. Va., 1960).

> must have been designed to bring out that the grate had in effect become a part of the working surface supplied to the longshoreman, so that the owner would be liable for a latent defect in the crate as he would for one in the deck or even, as was held in Grillea v. United States, 2 Cir., 1956, 232 F. 2d 919, for a misplaced cover which the injured longshoreman had himself installed over part of a hatch. The same principle underlies Rich v. Ellerman & Bucknall S. S. Co., 2 Cir., 1960, 278 F. 2d 704. That, like the instant case, related to an injury sustained in loading, but 'the unseaworthiness lay in the stowage of truck chassis previously loaded which turned out to afford an unstable footing. Thus the chassis in Rich, like the crate in Reddick and the hatch cover in Grillea, had become, as was said in the Grillea case at p. 923, 'as much a part of the 'tweendeck for continued prosecution of the work, as though it had been permanently fixed in place.'"

Justice Harlan, before his elevation to the United States Supreme Court, and while gracing the Bench of the United States Court of Appeals for the Second Circuit, in one of the most scholarly decisions ever written on the question of unseaworthiness, in the case of *Dixon* v. *United States*, 219 F. 2d 10, decided February 7, 1955, explained, in detail, the shipowner's duty to furnish a seaman with a safe place to work, tracing the law back to the case of *The Noddleburn*, D. C. D. Or. 1886, 28 F. 855 (original petition, pp. 14-15).

The decision by the Court below is contrary to the clear mandate of the Supreme Court.

That the fact that the decisions by the Court below constitute adoption of minority view as controlling is clearly demonstrated by Judge Clark in his dissenting opinion, concurred in by Judge Smith, in the *per curiam* decision in the petition for a rehearing *in banc* in *Pinto* v. *States Marine Corporation of Delaware*, 296 F. 2d 1-9.

The decision by the Court below is in conflict with all prior decisions treating with the question of seaworthiness, the latest two being as follows:

> *Edna Fall, as Admrx. of the Estate of Philip Fall* v. *Esso Standard Oil Company* (5th Cir.), decided December 13, 1961, No. 18578 (not officially reported as yet);
>
> *Massa* v. *C. Z. Venezuelan Navigation, etc.*, (2nd Cir.), decided January 15, 1962, No. 27059 (not officially reported as yet).

In the *Massa* case, *supra*, decision by Circuit Judges Waterman, Smith and Marshall, the Court stated:

> "The doctrine of unseaworthiness imposes upon a ship owner an absolute duty to furnish a vessel and appurtenances thereto reasonably fit for their intended use. Mitchell v. Trawler Racer, Inc., 362 U. S. 539 (1960). The fact that the stevedoring firm may have supplied the defective appurtenance, here the pallet, does not absolve the vessel owner from liability under the doctrine. Petterson v. Alaska S. S. Co., 205 F. 2d 478 (9 Cir. 1953), aff'd per curiam 347 U. S. 396 (1954); Reed v. The Yaka, 183 F. Supp. 69 (E. D. Pa. 1960). Nor is the fact that the injury occurred on shore a bar to recovery so long as the requisite maritime 'status' or 'relation' is present. Strika v. Netherlands Ministry of Trade, 185 F. 2d 555 (2 Cir. 1950), cert. denied 341 U. S. 904 (1951); Litwinowicz v. Weyerhaeuser Steamship Co., 179 F. Supp. 812 (E. D. Pa. 1959)."

Implicit within, and expressed by, all Supreme Court decisions in point, is the clear instruction that no distinction shall be made, based on time, circumstances or causation of an unsafe place to work, aboard ships in navigation.

No lexiphonic or grandiloquent language constitutes a substitute for a shipowner's duty to provide his crew and

longshoremen with a reasonably safe place to work. The expediency of giving descriptive names to existing dangers in nowise changes the true facts.

A ship is either seaworthy or not.

Words are but mere sound, whereas seaworthiness is a realistic requirement on which rests the lives and safety of all persons working in maritime service as a means of earning a living (original petition, pp. 24-25).

A new burden of proof has erroneously been established by the Court below.

Proof of preventive, separable or alienable nature of unseaworthiness is now required of the accident vjctim, as further burden of proof, never required heretofore, that is if the holding by the Court below, in petitioner *Hooper's* case, is to be considered good law.

The Court below erroneously made findings of fact in a manner which is in direct conflict with the holding by this Court in the case of McAllister v. United States, supra (348 U. S. 19, 75 S. Ct. 6).

The trial court in the *Hooper* case herein did not make a finding of "inherent danger".

The uncontradicted evidence was that the manner of affixing the cargo chains, when the cargo was originally loaded, caused a buckling of the deck lumber and created spaces between many piles of lumber. The proof was that these conditions *created* the proximate danger which caused the footing, on which Hooper was working, to suddenly shift and throw him overboard (fol. 231, Hooper Record).

The labelling of such unsafe conditions as "inherent danger" and therefore not unseaworthy, does violence to the true meaning of words in common usage and merits review for correction by the Supreme Court (original petition, p. 26).